BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
) No. 83A-254
BILLY' L. AND SUZETTE DAVIS)

Appearances:

For Appellants: Roger N. Brown
Enrolled Agent

For Respondent: George L. Bond
Counsel

OPINION

This appeal is made pursuant to section 18593 1/ of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Billy L. and Suzette Davis against a proposed assessment of additional personal income tax and penalties in the total amount of $1,457.94 for the year 1978, and against proposed assessments of additional personal income tax in the amounts of $5,088.34 and $3,525.00 for the years 1979 and 1980, respectively.

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the years in issue.

The principal issue on appeal is whether appellant Billy L. Davis was a California resident during the years in question. We will refer to Mr. Davis as "appellant."

Appellant retired from the United States Air Force out of Mississippi's Kessler Air Force Base in 1977. Subsequently, appellant and his family moved to Marysville, California, where they rented a house in August 1977.. In November 1977, appellant secured work in Alaska as a meteorologist. While his job required appellant to live in Alaska for a large portion of each of the appeal years, he returned to California for approximately two months out of every year. Appellant's wage statement (W-2 form) listed his California home as his permanent address.

Appellant's wife and two children remained in Marysville while appellant worked in Alaska. Mrs. Davis was employed in Marysville and the children attended school in that city. In May 1979, appellant and his wife purchased a residence in Marysville, and, thereafter, appellant changed his wage statement to reflect the new California address.. During the years at issue, appellant and his family maintained checking and savings accounts in California. Most of their banking was conducted through these accounts. Appellant's wife was registered to vote in this state while appellant was not registered to vote in any state. Both appellant and-his wife held California driver's licenses and their vehicles were registered and maintained in California.

Appellant and his -wife apparently filed joint resident tax returns for Alaska during the years in question. Mr. and Mrs. Davis 'did not file a tax return in California for 1978. They did file joint nonresident California tax returns for 1979 and 1980. Even though appellant's wife participated in the joint nonresident tax returns for 1979 and 1980, appellants apparently concede that she was a resident of California during the appeal years.

Upon review of appellant's tax returns for the appeal years, respondent requested information regarding appellant's residency status and was provided with the above data. -Respondent concluded that appellant was a California resident and assessed appellants accordingly. This appeal followed.

We begin by noting that respondent's determination of residency status is presumed to be correct and that the taxpayer bears the burden of proving that respondent's actions are erroneous. (Appeal of Patricia A. Green, Cal. St. Bd. of Equal., June 22, 1976; Appeal of Robert C. Sherwood, Deceased, and Irene Sherwood, Cal. St. Bd. of Equal., Nov. 30, 1965.)

Section 17041 imposes a personal income tax upon the entire taxable income of every resident of this state. Section 17014, subdivision (a), defines "resident" to include: (1) every individual who is in this state for other than a temporary or transitory purpose, and (2) every individual domiciled in this state who is outside the state for a temporary or transitory purpose.

The initial question is whether appellant was domiciled in California within the meaning of section 17014 throughout the years at issue. "Domicile" refers to one's settled and permanent home, the place to which one intends to return whenever absent. (Whittell v. Franchise Tax Board, 231 Cal.App.2d 278, 284 [41 Cal.Rptr. 673] (1964); Cal. Admin. Code, tit. 18, reg. 17014, subd. (c).) An individual has only one domicile at a time: to change a domicile, one must actually move to a new residence and intend to remain there permanently or indefinitely. (In re Marriage of Leff, 25 Cal.App.3d 630, 642 [102 Cal.Rptr. 195] (1972).) One's acts must give clear proof of a concurrent intention to abandon the old domicile and establish a new one. (Chapman v. Superior Court, 762 Cal.App.2d 421 [328 P.2d 23) (1958); Appeal of David C. and Livia P. Wensley, Cal, St. Bd.. of Equal., Oct. 27, 1981.)

Clearly, appellant's acts indicated that he did not intend to remain in any other state permanently or indefinitely. Appellant apparently severed all ties with Mississippi prior to coming to California. Even though he makes a vague reference to being in California to visit his wife's relatives, appellant and his wife rented a house soon after they arrived. His wife and family lived in California during appellant's work-related absences, and we note that the maintenance of a marital abode in a particular location is a significant factor in determining an individual's domicile. (Aldabe v. Aldabe, 209 Cal.App.2d 453 [26 Cal.Rptr. 208] (1962).)

Finally, while appellant spent considerable time in Alaska, he returned to California whenever his work allowed. It appears that he did not own any real or

personal property in Alaska. In short, appellant's only significant contact with that state was his month-to-month employment, which, when compared to his contacts with, California, is little evidence that appellant intended to change his domicile to Alaska.

We also note that appellant's situation is not unlike that of a merchant seaman. As with a merchant seaman's occupation, appellant was required to spend a majority of each year outside of the state pursuing his career choice. As with many of our prior merchant seamen cases, appellant left his wife and family in California while he was out of the state. In a number of these earlier appeals we have noted that a seaman is generally considered domiciled at the place where his family resides. (Appeal of Benton R. and Alice J. Duckworth, Cal. St. Bd. of Equal., June 22, 1976; Appeal of John Haring, Cal. St. Bd. of Equal., Aug. 19, 1975; Appeal of Olav Valderhaug, Cal. St. Bd. of Equal., Feb. 18, 1954.) Based on the factors listed above, we must conclude that appellant was a domiciliary of California for the years in question.

We next turn to the question of residency. A California domiciliary will be considered a resident if his absences from this state are for temporary or transitory purposes. (Rev. & Tax. Code, § 17014.) In the Appeal of David J. and Amanda Broadhurst, decided by this board on April 5, 1976, we summarized the regulations and case law interpreting the phrase "temporary or transitory purpose" as follows:

> Respondent's regulations indicate that whether a taxpayer's purposes in entering or leaving California are temporary or transitory in character is essentially a question of fact, to be determined by examining all the circumstances of each particular case. [Citations.) The regulations also provide that the underlying theory of California's definition of 'resident" is that the state where a person has his closest connections is the state of his residence. . . . Some of the contacts we have considered relevant are the maintenance of a family home, bank accounts, or business interests; voting registration and the posse&ion of a local'driver's license; and ownership of real property. [Citations.) Such connections are important both as a measure of the benefits and protection which the taxpayer has received from the laws and government of

> California, and also as an objective indication of whether the taxpayer entered or left this state for temporary or transitory purposes. [Citation.]

Reviewing the record we note that appellant's family home was in this state. Appellant and h-is wife owned real property in Marysville, had their checking and savings accounts in California, and did the majority of their banking in this state. Appellant's children attended school in Marysville, appellant had a California driver's license, and the family car was registered in this state. Apparently, all of appellant's vacations were spent in this state. Although appellant was physically present in California for only two months each year, as described above, he enjoyed substantial benefits and protections from the laws and government of this state, a factor indicative of residence- (Appeal of Bernard and Helen Pernandez, Cal. St. Bd. of Equal., June 2, 1971.) The only known connection appellant had with Alaska was his employment. Appellant's close connections with this state and lack of substantial connections with any other state warrant a conclusion that his absences were temporary or transitory and that he was, therefore, a California resident during the years at issue. (Appeal of John Barungp, r a : Appeal of Bernard and Helen Fernandez, supra; Appeal of Arthur and Frances E. Eiorrigan, Cal. St. Bd. of Equal., July 6, 1971.)

Appellant contends that although his employment was on a month-to-month basis, because of the length of time he remained at his job, his employment has effectively become permanent. Appellant argues that since his employment is effectively permanent, Internal Revenue Code section 162 and its California equivalent, section 17202, state that his "home" is where he does business, Therefore, he concludes, Alaska is his "home" and he is not a resident of California.

Appellant's reliance on section 17202 is misplaced. Section 17202 allows a deduction for away from "home" business travel expenses. While it is true that the "home" for the purposes of this deduction is generally considered to be the place of an individual's employment rather than his domicile (Daly v. Commissioner, 72 T.C. 190 (1979)), the criteria for establishing a taxpayer's "home" in connection with employee business expenses are different from those required for establishing a taxpayer's residence. (Appeal of Earl and Mary J. Johnson, Cal. St. Hd. of Equal., June 21, 1983; Appeal of David C. and

Livia P. Wensley, Cal. St. Bd. of Equal., Oct. 27, 1981.): Simply stated, section 17202's "home" has no relation to the determination of a taxpayer's residency, even though both terms may refer to the same physical location. (Appeal of Earl and Mary J. Johnson, supra; Appeal of David C. and Livia P. Wensley, *supra.*)

Finally, appellants object to respondent's imposition of a penalty for their failure to file an income tax return for 1978. Appellants contend that they should not be subject to a penalty because a "return" was prepared by one of respondent's employees when the deficiency assessment was computed.

Appellants' argument has no validity.. A taxpayer is required to file a return on or before the due date for filing a return or be subject to penalties. (Rev. & Tax. Code, § 18691.) Appellants admit that they have never filed a return for 1978. The penalty was properly imposed.

For the reasons state above, we will sustain respondent's action in this matter.

Appeal of Billy L. and Suzette Davis

O R D E R

Pursuant to the views expressed in the opinion of the board on file ih this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Billy L. and Suzette Davis against a proposed assessment of additional personal income tax and penalties in the total amount of $1,457.94 for the year 1978, and against proposed assessments of additional personal income tax in the amounts of $5,088.34 and $3,525.00 for the years 1979 and 1980, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 20th day of August, 1985, by the State Board of Equalization, with Board Members Mr. Collis, Mr. Nevins and Mr. Harvey present.

_____, Chairman

Conway H. Collis, Member

Richard Nevins, Member

Walter Harvey*, Member

_____, Member

*For Kenneth Cory, per Government Code section 7.9